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CHARLES ELMORE

IN THE SUPREME COURT OF THE UNITED STATES

NO. 221, OCTOBER TERM, 1941

MARY ZACHARIE BROCK, ET AL.,
Petitioners,

VS.

BARNSDALL OIL COMPANY, ET AL.,
Respondents.

REPLY OF MARY ZACHARIE BROCK, ET AL., PETITIONERS, TO "REPLY OF J. O. PHILLIPS, ET AL., RESPONDENTS, TO PETITIONS FOR CERTIORARI" AND ALSO TO "REPLY OF BARNSDALL OIL COMPANY, ET AL. TO PETITIONS FOR WRIT OF CERTIORARI".

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With the hope that we may aid the Court in reaching a correct decision herein, upon the undisputed facts and the law applicable thereto, we respectfully show to the court as follows, to-wit:

It is true, as stated by counsel for respondents J. O. Phillips, et al., that Alexander vs. Barfield, 6 Texas, 400, "did not involve a sale (of land) by an administrator (pro tem) but (merely) the right of an administrator pro tem to sue where no such authority was conferred by the order appointing him". Obviously, the right or power of an administrator pro tem to prosecute a suit instituted by his intestate is a right or power of much less dignity or importance, much less "full",

than the right or power to sell land belonging to his intestate.

The essential distinction between land and all other forms of property has always been recognized and applied in and by the laws of Texas and the decisions of its courts construing and applying those laws. Indeed, we believe that such distinction between land and all other forms of property has been recognized and applied in practically all civilized states and nations, more especially in those states, like Texas, which have adopted the principles of the common law of England as applicable and controlling in the absence of repeal or modification by constitutional provision or by express statute.

In Dull vs. Drake, 68 Tex., 205, cited in our original brief herein, the court recognized that essential distinction in these words, to-wit: "land is a species of property that the law deems of so much importance that it must not be sold for any purpose, so long as there is anything else that can be disposed of with more advantage to the estate", etc.

In Alexander vs. Barfield the temporary administrator was attempting, not to sell land belonging to the estate of his intestate but to protect and preserve the estate by the further prosecution of an action instituted by his intestate and pending at the date of his death.

The order of court involved in Alexander vs. Barfield was as follows: "It is ordered by Robert Turner, chief justice of said county (Shelby County, Texas) that Charles H. Alexander be and he is hereby appointed temporary administrator of the estate of John M. Alexander; and he is hereby empowered to transact all business as administrator of said estate until one may be appointed in our court of law. Witness my hand this

4th day of September, 1850. (Signed) R. Turner, Chief Justice."

For further discussion of Barfield vs. Alexander see p. 24 of our original brief in this court.

Counsel for appellants in Dull vs. Drake, 68 Texas, 205, urged upon the court the proposition that the probate court of McMullen County, Texas, "being a court of general jurisdiction of matters within its cognizance, upon a collateral attack all presumptions will be indulged in favor of its orders, judgments and decrees; and when the court acts upon a subject matter within its jurisdiction, upon a collateral attack, its jurisdiction will be presumed to have attached in the particular case, unless the records clearly show affirmatively to the contrary", citing earlier Texas cases in support thereof. As more fully shown on page 26 of our original brief herein, that case was an action of trespass to try title to land and the attack made upon the deed executed and delivered by the temporary administrator was **purely collateral.** The same is true of Cruse vs. O'Gwin, 106 S. W., 757.

In Dull vs. Drake Chief Justice Willie among other things said: "The bill (of exceptions) further states that the appellants then offered in evidence a deed from J. L. Croom, Jr., administrator of the estate of Charles Coley, deceased, to W. A. Hill, for said land, and also the records of the probate court of McMullen County, showing application of John L. Croom, Jr. for letters of temporary administration on the estate of Charles H. Coley, deceased, and application to sell the land in controversy; also, order of court appointing Croom temporary administrator of said estate, and ordering sale of the land in controversy by said administrator; also, the report of the sale, **and its confirmation by the court.** Upon ob-

jection, the administrator's deed was ruled out by the court, and the assignments of error relate solely to its rejection". That action of the trial court was affirmed.

There the probate court granted the application of the temporary administrator for an order to sell land and thereafter the probate court confirmed the report of sale of land made by the temporary administrator.

The primary and basic proposition involved in that decision was simply this, to-wit: that the probate court of McMullen County was wholly without power or jurisdiction to authorize a mere temporary administrator to sell and convey land belonging to the estate.

The quotation from Cruse vs. O'Gwin on pages 5 and 6 of brief for respondents J. O. Phillips, et al., is misleading and incomplete, because torn loose from its immediate context. What the court there actually said was this, to-wit: "Even though there was no entry in the record books of the court tending to show that order of sale was issued to **THE PERMANENT ADMINISTRATOR,** or tending to show an approval of the sale made by him, still, if there was anything written on any paper filed in the case in the probate court that directly or indirectly indicated approval of the sale by the probate court, we would sustain its validity under the authority of decisions of the Supreme Court. Neill vs. Cody, 26 Texas, 286; Moody vs. Butler, 63 Texas, 210. But in this case there was no confirmation, nothing from which a confirmation can be inferred, and nothing done by the purchaser giving him the right to have the sale confirmed".

Comment on the foregoing is unnecessary. Our emphasis on the words "the permanent administrator" is entirely sufficient.

In Neill vs. Cody, 26 Texas, 286, the facts briefly

were these: a regular or permanent administrator, not a mere administrator pro tem, applied to the probate court for an order to sell certain land; said order was granted and later the administrator reported a sale of the land but it did not appear that there ever was any order of court approving or confirming said report of sale and there was no evidence that the sale was completed by a compliance with the terms of sale by the purchaser. It was held that a confirmation of the sale, or something from which the confirmation might be inferred, or, at least, something done by the purchaser entitling him to have the sale confirmed, was necessary to be shown in order to enable him to claim title under it.

The case did not involve any act of a temporary administrator or administrator pro tem.

The sale of land involved in Moody vs. Butler, 63 Texas, 210, was made by an executor, and not by a temporary administrator or administrator pro tem.

As is apparent on its face, Article 1176, Hartley's Laws of Texas, page 373 (Sec. 67 of Probate Act of March 20, 1848) related solely to sales made by "the executor or administrator"—i. e., made by a regular or permanent administrator and not by a mere administrator pro tem.

In said Article 1176 the associated words "executor or administrator" were used five separate times; while the words "temporary administrator" or "administrator pro tem" were not used at all therein.

Seefeld vs. Duffer, 179 Fed., 214, cited on page 8 of brief for respondents J. O. Phillips, et al. has not the slightest relevancy or value, simply because the sale of land there involved was made by a regular or permanent administrator, and no act of a temporary administrator was even remotely considered.

On page 2 of brief for respondents Barnsdall Oil Company, et al., it is stated that "there was not in 1860, when the sale in question was made, nor at any other time, any statute **prohibiting** a temporary administrator, when authorized by the court, from making a sale of real estate to pay debts of the estate". That argument is fallacious because it **assumes** that in the absence of an express prohibition the probate court had the power "to authorize" a temporary administrator to sell land to pay debts of an estate. That is the very question at issue herein.

It is undeniable, and able opposing counsel in their respective briefs concede, that the Probate Act of March 20, 1848, in force during 1860, did not expressly authorize the probate court to grant to a temporary administrator or administrator pro tem the power to sell land, for whatsoever purpose.

As more fully developed in our original brief herein, administrators pro tem are mentioned in only Sections 27, 28, 29 and 116 of Probate Act of March 20, 1848.

Said Section 27 provided for the appointment of administrators pro tem, "with such limited powers as the circumstances of the case may require", in limine and prior to probate of will or appointment of a permanent or regular administrator; while said Section 28 provided for the appointment of a like administrator pro tem, "with such limited powers as the circumstance of the case may require", "pending any contest relative to the probate of a will or the granting of letters of administration".

Said section 29 related wholly to the oath and bond of the administrator pro tem; while said Section 116 related entirely to what should be done whenever an administrator pro tem "shall have been appointed and

an executor shall afterwards be qualified or an administrator appointed". **Said Section 28 alone** related to or mentioned the **powers** to be exercised by an administrator pro tem appointed pursuant thereto.

Said Section 28 on its face draws an absolutely clear distinction between the "limited powers" which the probate court could confer upon administrators pro tem and those "full powers" which the Probate Act of March 20, 1848, expressly conferred upon "executors and administrators".

Undeniably, among the "full powers" granted by that Act to every executor and every administrator were these, to-wit: (a) the power to investigate, and then allow or reject, claims against the estate and (b) the power to sell land belonging to the estate, under proper order of court, to pay just debts when allowed and approved by the court.

On page 8 of brief for respondents J. O. Phillips, et al. it is stated broadly, "under our statutes, any power that could be conferred on a regular administrator might be conferred on an administrator pro tem". The cases cited to support that bald assertion do not do so.

Callahan vs. Houston, 78 Texas, 494, merely held that the probate court had the power to authorize a temporary administrator to prosecute an action already begun by the decedent.

Robinson vs. Montel, 11 Texas, 149 is interesting, historically, because it involved an alleged sale of a negro slave, but the case does not, even remotely, support the proposition that "under our statutes, any power that could be conferred on a regular administrator might be conferred on an administrator pro tem".

In Ellis vs. Holcombe, 69 S. W. (2d), 449, 454, it was said: "The general rule of construction of statutes is thus stated in Sutherland on Statutory Construction, page 412: 'Where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. Such affirmative legislation and any other which introduces a new rule imply a negative.' This rule of construction is based upon the legal maxim that the expression of one thing is exclusive of another".

To like effect see these cases:

Paso Robles Co. vs. Commissioner of Internal Revenue, 33 Fed. (2d), 653;

Martin vs. Commissioner of Internal Revenue, 61 Fed. (2d), 942;

Anderson vs. Madsen Investment Co., 76 Fed. (2d), 768;

City of Corpus Christi vs. McMurray, 90 S. W. (2d), 868;

Milhollon vs. School District (Comm. of App.), 231 S. W., 332; 39 Texas Jurisprudence, p. 188, Sec. 100; and 59 C. J., p. 984.

On page 2 of reply brief of Barnsdall Oil Company, et al. it is stated that "the Probate Act of 1848, by necessary implication, and by express legislative enactment, authorized the court to confer upon administrators pro tempore and especially upon administrators pendente lite the power to sell real estate", to which we reply: If there was such "express legislative enactment", why should counsel refer to "necessary implication" of alleged authority?

In fact, said Probate Act did not, either expressly

or by "necessary implication", authorize the probate court to empower an administrator pro tem to sell real estate; significantly, counsel did not cite or quote any such alleged statutory power, either express or implied.

Again, we have found nothing in that Probate Act of 1848 relating to "administrators pendente lite", eo nomine.

Said Act mentions only "administrators pro tem", executors and administrators.

It is there also argued by opposing counsel that under Sections 44 and 45 of said Probate Act (see said sections on page 2 of appendix to said reply brief) it became the imperative duty of the probate court to provide the money necessary for the support and maintenance of the widow and minor children immediately, at the first term of the court after the granting of letters, and also to provide funds on certain contingencies in lieu of exempt property. But, on page 4 of said brief it is admitted that "In the case at bar **the land was not sold** to pay any of the allowances above referred to"—i. e., for support and maintenance of widow and minor children and/or in lieu of exempt property not on hand at date of death.

Said Section 44 provided "that at the first term of the court, **after the original grant of letters testamentary, or of administration,** it shall be the duty of the chief justice", etc. Clearly, said Section 44 had nothing whatsoever to do with the powers, rights and duties of administrators pro tem.

The same thing is equally true of Section 45 which provided "that at the first term of the court **after an inventory and list of claims have been returned,** it shall be the duty of the chief justice to set apart", etc.

Said Probate Act contained the express requirement that the executor or administrator should, at a specified time, file an inventory, appraisement and list of claims of the estate: that law contained absolutely nothing similar to that with respect to administrators pro tem.

It will be observed that opposing counsel have cited no Texas case—in fact, no authority whatsoever—in support of their contentions as set out on pages 2 to 5 of said reply of Barnsdall Oil Company, et al.

There is no such Texas case and, apparently, diligent counsel were unable to find any outside case or authority for their propositions.

On page 5 of said brief counsel for Barnsdall Oil Company, et al, have cited Dull vs. Drake, 4 S. W., 364; Cruse vs. O'Gwin, 106 S. W., 757; Reed vs. Harlan, 103 S. W. (2d), 236; Saul vs. Frame, 22 S. W., 984; and Corley vs. Anderson, 23 S. W., 839.

We have already sufficiently considered Dull vs. Drake and Cruse vs. O'Gwin.

In Reed vs. Harlan no act of a temporary administrator was involved or considered: in fact, the court there said:

"No action under special powers granted in his appointment as temporary administrator was shown". In that case the person appointed temporary administrator was subsequently made permanent administrator and thereafter functioned "as permanent administrator, without question, until April 3, 1935".

As shown by quotation therefrom on page 6 of said reply of Barnsdall Oil Company, et al., Reed vs. Harlan was there cited in support of the general proposition that the orders of a probate court made in the course

of general administration of an estate "are not absolutely void and can be set aside after the expiration of the term only on direct attack", etc. On page 17 hereof we have effectually answered that contention, with citation of authorities, and shall not here repeat what is there said.

Saul vs. Frame, supra, involved no question whatsoever with respect to the rights, powers and duties of a temporary administrator or administrator pro tem. Opposing counsel have cited it only on the general proposition re collateral attack and no comment on it is deemed necessary.

As far as we can see, Corley vs. Anderson, supra, has no bearing whatsoever on any question now before this court and, therefor, needs no consideration here.

None of the other cases cited by counsel for Barnsdall Oil Company, et al., on page 7 of their brief, involved the power, if any, of the probate court to authorize a mere temporary administrator or administrator pro tem to sell and convey real estate: therefore, we make no comment thereon.

Under Section 23 of Act of March 20, 1848, the probate court was itself without power to authorize the administrator pro tem appointed pursuant thereto either (a) to investigate, and then allow or reject claims against the estate, or (b) to sell land belonging to the estate—this, more especially in view of the plain verbiage of Section 135 of said Probate Act of March 20, 1848.

Bearing in mind the fact that at common law neither an administrator nor a temporary administrator had anything whatever to do with land belonging to the decedent and also bearing in mind the inclusion in Probate Act of March 20, 1848, of Section 135, it seems self-evident that if the Texas Legislature had intended,

when enacting that probate law, to confer upon the probate court power to authorize a mere administrator pro tem to sell and convey land belonging to the estate, such a radical departure from the rules and principles of the common law would have been covered by an express provision to that effect, wholly free from ambiguity or uncertainty.

On page 8 of reply of J. O. Phillips, et al., it is broadly and incorrectly stated that "under the common law it is the duty of **any** administrator, temporary or otherwise, to pay debts and expenses of administration, for such purpose having the right to use **ANY** of the assets in hands".

In Thompson vs. Duncan, 1 Texas, 485, the Supreme Court of Texas said:

"The rule of the common law is that the personalty shall go to the legal representative, and the realty shall descend to the heir, on the death of his ancestor. The heir takes the land subject to a particular grade or dignity of debt, but the personal representative has nothing to do with it".

In Stevenson vs. Roberts, 25 Texas Civil Appeals, 577, and 64 S. W., 230, the court said:

"At common law, real estate was not subject to administration, but the executor took the legal title to the personal property of the testator, with power of disposition over it".

Such was the law of Texas at date of attempted sale by Fullerton as administrator pro tem to Robert Mott, except as expressly modified by Probate Act of March 20, 1848.

"The common law rule was that the real estate of a decedent could not be subjected to payment of his

debts unless such debts were specifically charged thereon by his will". (24 C. J., p. 459, Sec. 1261, citing both English and American cases.)

On January 20, 1840, the Congress of the Republic of Texas enacted "an Act to adopt the Common Law of England, to repeal certain Mexican laws, and to regulate the marital rights of parties". Section 1 of said Act read thus: "Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, that the common law of England (so far as it is not inconsistent with the Constitution or the Acts of Congress now in force) shall, together with such Acts, be the rule of decision in this Republic, and shall continue in full force until altered or repealed by the Congress". Such has been the law in Texas ever since January 20, 1840.

The comprehensive Texas probate law of March 20, 1848, took the place of and superseded an act of date February 5, 1840, enacted by the Republic of Texas, entitled: "An Act regulating the Duties of Probate Courts, and settlement of Succession". Said last mentioned Act was in force until March 20, 1848. Said Act of February 5, 1840, contained no provision whatsoever, as far as we can find, for the appointment of a temporary administrator, or administrator pro tem, or administrator pendente lite.

From the foregoing it is indisputable that in Texas prior to March 20, 1848, in any event, there was no statute providing for the appointment of administrators pro tem, or temporary administrators, and further that thereafter upon common law principles such temporary administrator or administrator pro tem had, and could have, absolutely nothing to do with land belonging to the decedent, and no court was empowered to attempt

to authorize such administrator pro tem to sell land belonging to his intestate.

On page 2 of their brief counsel for J. O. Phillips, et al. state, with much emphasis, that the title conveyed to Robert Mott by Fullerton as administrator pro tem "has been the **active title"**, etc.

Now, we know of no Texas law or court decision defining or explaining what constitutes "an active title" and/or what constitutes "an inactive title"; but we do know that in Texas mere "activity" never creates "a title", whether to land or personalty. The true question at issue herein was thus properly stated by Circuit Judge Holmes: "This is a suit to recover a two-thirds interest in certain real estate in Nueces County, Texas ***** **Our decision turns upon the validity of a temporary administrator's deed** which was executed on March 1, 1860. It is admitted that, if the deed is good and conveyed title to the land, the judgment of the court below should be affirmed". The Circuit Court of Appeals held the deed to be "good" and, therefore, that it "conveyed title to the land". There is, properly, nothing in the opinion of that court concerning either "activity of title" or "inactivity of title".

Either the deed made by administrator pro tem to Mott passed the title to the land or it did not pass it. If that deed did not convey the "title" to Mott, then none of the numerous persons and corporations attempting to deraign title from and under Mott has ever acquired any "title" to any part of the land involved herein. The case here involves no element of estoppel. No party hereto even remotely hints that he or it was in any manner mislead by any supposed "inactivity of title" on the part of your petitioners. There is no claim that "the record" in the probate cause at Corpus Christi in

re estate of John Peter Schatzel, deceased, did not on its face, at all times during such alleged "activity of title", affirmatively and clearly show that Mott's sole claim of title rested upon the attempted conveyance made to him by Fullerton as administrator pro tem. It is not even remotely hinted that any of the records in that probate cause at Corpus Christi have ever been lost or destroyed. Hence, there is absolutely no room for the indulgence of any presumption or presumptions in favor of the alleged "active title".

It is well recognized law in Texas that, aside from claims of title based upon adverse possession under applicable statutes of limitation, it is legally unimportant that your petitioners and their ancestors have not paid taxes on the land involved herein nor taken actual, physical possession of it; also, that the doctrine of stale demand never applies in Texas as against the owner of a legal title to land.

In Murphy vs. Welder, 58 Texas, 235, it was said:

"In the present case the defendants in error have a clear legal title to the land in suit, perfect on its face, and to such a title the plea of stale demand alone could not possibly constitute a defense. ***** No conclusion, adverse to the legal title of the true owner, can be drawn from the fact that, after his title is perfected, he refrains, for a long period of time, to take corporeal possession of his land. His title, in law, draws to it the possession, and this constructive possession remains with the holder of the fee until some hostile act, amounting in law to an act of ouster, destroys this character of possession ***** We know of no authority to warrant the court in holding that the mere failure to pay taxes or the laches or delay of the owner in bringing suit for recovery of the land to which he has a legal title, will defeat his action, where there has been no actual adverse possession for a suf-

ficient length of time to support a plea of limitation. Williams vs. Conger, 49 Texas, 602. These views are very pertinent to questions in this case before the court and are conclusive against the plea of stale demand".

Murphy vs. Welder has been frequently followed in later Texas cases.

As far as concerns the question of alleged laches, failure to take possession, failure to pay taxes, alleged inactivity of title, etc., the facts involved in Higgins Oil & Fuel Company vs. Snow, 113 Fed., 433, were quite similar to those involved herein. In that case the suit was brought in 1901, while the title asserted by Mrs. Snow originated in 1871. In that case a very able trial judge among other things said:

"The first question presented (i. e., that of alleged laches on the part of Mrs. Snow) has been frequently decided by the Supreme Court of Texas, where it is held that, if the complainant's title is a legal one, as in the present case, capable of being established at law, the doctrine of laches and stale claim does not apply. **It is simply a question of adverse possession.** San Patricio Corporation vs. Mathis, 58 Texas, 242; Moss vs. Berry, 53 Texas, 632; Williams vs. Conger, 49 Texas, 602; House vs. Brent, 69 Texas, 30; Lumber Company vs. Pinkard (Texas Civ. App.), 23 S. W., 723; Land Company vs. Hyland (Texas Civ. App.), 28 S. W., 206". (Bold face ours)

That pronouncement of the law was approved by the U. S. Circuit Court of Appeals.

A few of the numerous Texas decisions illustrating when presumptions may, or may not, be properly indulged by a court are these, to-wit:

Town of Refugio vs. Strauch, 29 S. W. (2d), 1041;
Baker vs. Coe, 20 Tex., 429;

Pendleton vs. Shaw, 44 S. W., 1002;
Hanson vs. Henson, 15 S. W. (2d), 579;
Chapman vs. Brite, 23 S. W., 514;
Mills vs. Herndon, 60 Tex., 353, 360;
McCarty vs. Merry, 59 S. W., 304, 306 (error refused);
Debrell vs. Ponton, 22 Tex., 686;
Geffert Case, 290 S. W., 1083;
Loving, etc. Co. vs. Higginbotham, 115 S. W. (2d), 1110;
Allar vs. Roeser, 217 S. W., 442;
McNally vs. Haynes, 59 Tex., 583;
West vs. Cameron, etc. Co., 4 S. W. (2d), 111;
Harrison vs. Barngrover, 72 S. W. (2d), 971;
Jobe vs. Osborne, 97 S. W. (2d), 939;
McMaster vs. Childress, 30 S. W., 843 (error refused); and
Frost vs. Crockett, 109 S. W. (2d), 529, 533.

On pages 8 and 9 of reply brief of J. O. Phillips, et al. cases are cited to support the proposition that "at all events the judgment attacked herein was a judgment of a court of general jurisdiction, immune against collateral attack".

None of the cases there cited supports the broad, sweeping proposition of alleged law thus stated. None of them in any manner conflicts with the Texas cases cited in our original brief herein re collateral attack.

Probably no stronger or better answer to that alleged proposition of law can be made than was made by this court, per Mr. Justice Field, in Windsor vs. McVeigh, 93 U. S., 274. At page 282 the court said:

"The doctrine invoked by counsel that, where a court has once acquired jurisdiction, it has the right to decide every question which arises in the cause, and

its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of action, such as civil or criminal, or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgements. It must act judicially in all things, and cannot then transcend the power conferred by the law. (Giving illustrations) The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases". The court then cited and discussed Bigelow vs. Forrest, 9 Wallace, 351, and said: "Doubtless a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the act of Congress, the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction. **** The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of Cornell vs. Williams,

reported in the 20th of Wallace, is more accurate. 'The jurisdiction' says the Justice, 'having attached in the case, everything done **within the power of that jurisdiction,** when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud' ".

Another lucid and unanswerable reply to that general proposition of opposing counsel herein is contained in United States vs. Walker, 109 U. S., 258. This court there held to be void for want of jurisdiction a judgment by Supreme Court of District of Columbia, directing an administrator who had been removed, to pay over to an administrator de bonis non appointed in his place, a sum collected by the former from the United States for a claim due to the intestate. There this court quoted Section 976 of Revised Statutes relating to the District of Columbia and among other things said:

"Although a court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void". The court then cited and discussed several earlier cases, including Windsor vs. McVeigh, supra, and said:

"In this case the statute gave the court power, on the removal of an executor or administrator, to order the assets of the decedent, which might remain unadministered, to be delivered to the administrator de bonis non. The court made an order directing delivery of the proceeds of administered assets. This was beyond the power conferred by the statute, and not within the jurisdiction of the court. The order was, therefore, void".

Incidentally, United States vs. Walker also supports our contention that at the common law even a regular or permanent administrator was wholly without power to sell land belonging to the decedent, and the probate or

chancery court was without power to authorize such sale. Among other things this court there said:

"It is well settled at common law that 'the title of an administrator de bonis non extends only to the goods and personal estate, such as leases for years, household goods, etc., which remain in specie and were not administered by the first executor or administrator, as also to all debts due and owing to the testator or intestate'. Bacon's Abr. Title Executors and Administrators, B 22, citing Packman's Case, 6 Coke, 293 (part VI, 1, 8 B)."

Also: "An administrator de bonis non derives his title from the deceased, and not from the former executor or administrator. To him is committed only the administration of the goods, chattels, and credits of the deceased which have not been administered."

What is there said as to the administrator de bonis non is equally applicable to an administrator pro tem or temporary administrator, or permanent administrator, as far as concerns the particular properties, only, to which such administrator, etc. is entitled to administer.

Of the cases re collateral attack cited by opposing counsel, Martin vs. Robinson, 67 Texas, 368, and 3 S. W., 550, is typical. Among other things the court there said:

"When a court of record, having general jurisdiction, has assumed to exercise it in a given case, all presumptions are in favor of the validity of its proceedings; and **if the record** of such a court shows the steps necessary to clothe it with power to act in the given case were taken, **or if the record be silent on this subject,** then its judgment, order, or decree must be held conclusive in any other court of the same sovereignty when collaterally called in question", citing earlier cases.

In the instant case "the record" affirmatively discloses, to the complete exclusion of any presumptions, that the probate court of Nueces County, Texas, attempted to confer upon a mere administrator pro tem the power to sell and convey land belonging to the estate—a power not conferred by Probate Act of March 20, 1848, upon the court as a court or upon the administrator pro tem as such.

In Harrison vs. Barngrover, 72 S. W. (2d), 971 (writ of error refused by Texas Supreme Court) the court among other things said:

"For any court to act within its jurisdiction, in the sense that its judgment is immune from collateral attack, it must not only have jurisdiction of the parties and of the res or property to be dealt with, but it must also have the power to enter the kind of order, judgment or decree which is the subject of the attack. Cline vs. Niblo, 117 Texas, 474, 8 S. W. (2d), 633, 638, 66 A. L. R., 916; Smith vs. Paschal (Texas Com. of App.), 1 S. W. (2d), 1086; Freeman on Judgments (5th Ed.), Sec. 372. It has long been recognized in this state that probate courts have only such powers as are delegated to them by statute. St. Paul Sanitarium vs. Crim, 84 S. W., 1114 (writ of error denied); Marks vs. Hill, 46 Texas, 345; Smith vs. Paschal, supra; Cline vs. Niblo, supra. The Constitution, in conferring upon the County Court or Probate Court exclusive original jurisdiction as to estates of minors, deceased persons, etc., simply conferred upon such court the general powers to administer the probate law. The specific powers to be exercised by the probate court and the manner of their exercise was left to statutory regulation by the Legislature. ***** Irrespective of the character or dignity of the tribunal pronouncing the decision, whether of inferior, limited or superior general jurisdiction, it must confine

its determination within the authority it possesses under the law and the case. If the court is exercising special statutory powers, the measure of its authority is the statute itself, and a judgment in excess thereof is null and void and subject to collateral attack, a rule which finds frequent application in the case of probate judgments".

In Harrison vs. Barngrover, supra, the court further said:

"In the case before us the Probate Court of Liberty County was acting under a statute which not only conferred upon it the specific power to lease the ward's land, but also specified the manner in which the power was to be exercised and the limitations upon the power thus granted. Thus the 'course of the court' was marked out by the Act, and the power to lease, specifically limited. No grant or lease not made in conformity with it could have any validity, nor could it confer any title not authorized by it. Therefore, in so far as the probate court assumed to lease the land of the minors beyond the time of their minority, it acted wholly without authority, and to that extent its judgment was a nullity. That the judgment was void in that respect was apparent upon the face of it. Being a nullity, it was subject to attack in any court, and there can be no doubt that the trial court was correct in so holding".

Possibly we should add that this court denied certiorari in Harrison vs. Barngrower: see 294 U. S., 731.

In Texas, at least, it has long been thoroughly established law, in fact elementary, that even a collateral attack may be made upon any order or judgment of a court of general jurisdiction **provided** when making such attack you confine yourself wholly to undisputed facts apparent of record in the original cause and, therefore,

are not required to resort to evidence aliunde that record.

Now, in this case your petitioners have not attempted to resort to evidence aliunde but have relied and are relying wholly upon undisputed facts which clearly and indisputably appear of record in the probate cause involving administration of estate of John Peter Schatzell, deceased.

The record in that cause shows indisputably as follows: (a) That Fullerton was a mere administrator pro tem when he applied to the court for authority to sell and convey the land involved herein; (b) that the order of court upon that application treated said Fullerton as such administrator pro tem only; (c) that when making the sale to Mott Fullerton acted only as administrator pro tem and so acted when he reported that sale back to the court for confirmation; (d) that the court treated and considered Fullerton as a mere administrator pro tem when the court approved that report of sale to Mott and attempted to authorize Fullerton as such administrator pro tem to execute and deliver a conveyance to Mott; and (e) that when executing and delivering that deed or conveyance to Mott said Fullerton acted merely as an administrator pro tem and so acted pursuant to alleged authority granted to him by said last mentioned orders of court.

These matters have been apparent of record in Nueces County, Texas, ever since they originally occurred. Mott was charged with notice of these undisputed record facts and with knowledge of the law applicable thereto; the same has been true of every person or corporation which has bought or leased in reliance upon that attempted conveyance to Mott. No question of innocent purchaser for value, without notice, is remotely involved herein.

Mott bought with his eyes open: the same thing is true of every one claiming under Mott.

Hence, if the legal title to the land involved herein did not pass to Robert Mott by force of the attempted conveyance thereof to him by Fullerton as administrator pro tem of the Schatzell estate, then it follows indisputably that the legal title thereto remained vested in James W. Zacharie, as devisee of Schatzell, and in these petitioners as his heirs at law, wholly irrespective of the long time which has elapsed since the attempted sale and conveyance to Robert Mott.

The law of Texas is thus properly stated in 14 Texas Jurisprudence, page 226, Section 447, to-wit: "The order of sale is a judgment of the probate court, and, **where the court has jurisdiction,** it is not subject to collateral attack. However, according to settled principles of the law of judgments, this rule does not obtain if the sale is void, as is the case **where the court had no jurisdiction to make it.** ***** While the law presumes everything legally necessary to have been done by the probate court, this is, of course, overcome when it is shown that the facts are to the contrary. And **there will be no indulgence of presumptions that are repelled by the record.**" (Bold face ours)

No Texas court has ever indulged a presumption **contrary to** record matters, especially court proceedings. Also, in Texas orders will never be presumed to have been made by a court of record, which cannot be produced, **unless** it be first proved that the records of the court making it have been lost or destroyed.

Texas courts never presume the existence of any fact which is contrary to the proof in a cause.

Of course, these principles of law have been announced many times by this and other Federal courts.

The doctrine that in Texas there can be no abandonment of a legal title (since the adoption there of the common law) was affirmed (with citation of cases) by the learned trial judge who decided this cause, in T. H. Mastin & Company vs. Kirby Lumber Company, 14 Fed. Supp., 858, and 15 Fed. Supp., 537, Section 7.

Possibly it should be further stated that, under the Spanish law and the Mexican law, prevailing in Texas until January 20, 1840, the legal title to land might be lost by reason of abandonment thereof, but that has not been the law of Texas for the past 100 years or so.

In Texas, aside from inheritance or devise, there are only two ways for one to acquire the legal or record title to land, to-wit: (a) By conveyance from its owner and/or (b) by adverse possession under applicable statutes of limitation.

As the result of pre-trial conference and pre-trial order of court it was stipulated by all of the litigants herein that the cause should be preliminarily tried and decided by the trial court wholly upon "the abstracts of title, title papers and other documentary evidence" which should and would thereafter be filed by the respective litigants, and so decided in the light of trial briefs which were to be confined to said "abstracts of title, title papers and other documentary evidence" and to the four questions suggested in paragraph IV of said order, to-wit: (a) Whether or not title to the land vested in Mott by force of the attempted conveyance to him made by Fullerton as administrator pro tem; (b) whether said Schatzell's will was validly probated; (c) the legal effect, if any, on probate of will resulting from the certiorari proceedings instituted in District Court of Nueces County by alleged heirs of the decedent; and (d) the legal effect, if any, of the dismissal of said certiorari proceedings. (Tr., 25 and 228)

Said pre-trial stipulation and order further provided as follows: "The foregoing agreements are made the order of the court, but it is expressly agreed that same shall be without prejudice to any other defenses of the defendants herein as to alleged causes of action pleaded herein by plaintiffs and by intervenors, respectively, as such defenses may be set out in the amended pleadings to be filed herein by them, respectively, as hereinabove directed: provided, however, that nothing herein contained shall deprive any of the plaintiffs, or any of the intervenors, of their respective rights under appropriate pleadings herein to urge and rely on plea or pleas of coverture and/or other disabilities by way of reply to any and all defenses which may be urged herein by defendants herein under any statute of limitation or otherwise, and/or to plead and rely on any other matters by way of reply to any and all such defenses as may be pleaded herein by defendants or intervenors herein". Tr., 28, par. VI)

Hence, if this court should find and hold that the attempted conveyance of land to Mott by Fullerton as administrator pro tem was void, for want of power on the part of the probate court to authorize any such sale, and then remand the cause for further proceedings below, all of the respondents herein with whom your petitioners have not yet compromised and settled, will still have available as defenses herein their rights, if any, under applicable Texas statutes of limitation.

It is admitted that John Peter Schatzell was and is the common source of title as to all parties involved in this litigation. The sole question is whether his title did, or did not, vest in Mott as the result of that which was done by the probate court and Fullerton as administrator pro tem acting under said orders of probate court of Nueces County.

In Texas it has always been comparatively easy to acquire title to land by force of adverse possession, under various statutes of limitation, commonly known in Texas as (a) the three year statute of limitation; (b) the five year statute of limitation; (c) the ten year statute of limitation and (d) the twenty-five year statute of limitation.

CONCLUSION

In conclusion, and pleading the importance of this case to our clients as our apology for the length of this reply brief, we respectfully renew the prayer of Mary Zacharie Brock, et al., petitioners, that the Supreme Court of the United States will grant their petition for a writ of certiorari herein to the Honorable United States Circuit Court of Appeals, for the Fifth Circuit, and that following submission of this cause in the Supreme Court, in due course, this court will reverse both the judgment of the trial court herein and that of said United States Circuit Court of Appeals herein, and remand this cause for further proceedings in the trial court, in accordance with the principles of law to be announced by the Supreme Court, thus affording all and singular the respondents herein their opportunity to make such further defenses herein, if any, as to them, respectively, may be available, whether under applicable Texas statutes of limitation or otherwise; also, that this court will tax and adjudge all costs in said United States Circuit Court of Appeals and in this court against the respondents hereinabove named: and further that said petitioners, Mary Zacharie Brock, and others, be granted

by this court any and all such additional relief, general and special, legal and equitable, as may be their due.

Respectfully submitted,

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Witness the personal signature of:

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Pritchett Harvey, Esq., Houston, Texas, is the attorney of record herein for Frank A. Ash and others, respondents and also petitioners for certiorari.

David B. Trammell, Esq., and Haynie E. Edwards, Esq., both of Fort Worth, Texas, are attorneys of record herein for J. O. Phillips, and others, respondents, who were intervening defendants in the trial court.

W. J. Howard, Esq., and Felix A. Raymer, Esq., both of Houston, Texas, are attorneys of record herein for respondents, Humble Oil & Refining Company, Humble Pipe Line Company, Barnsdall Oil Company and Flour Bluff Oil Corporation.

A copy of this reply brief has been mailed by counsel for Mary Zacharie Brock, et al., petitioners, to every one of the above named attorneys of record herein.